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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**

7 FERNANDO GALLEGOS,

8 Petitioner

9 v.

10 ISIDRO BACA, et al.,

11 Respondents

Case No.: 3:15-cv-00254-RCJ-CBC

ORDER

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13 On February 9, 2018, the court granted respondents' motion to dismiss this 28 U.S.C. §
14 2254 habeas corpus petition in part (ECF No. 55). The court dismissed grounds 3 and 4(b) and
15 concluded that ground 4(c) was unexhausted. Petitioner Fernando Gallegos has filed a motion
16 for reconsideration, which respondents opposed (ECF Nos. 56, 58). As discussed below, the
17 motion for reconsideration is denied.

18 A federal district court has the inherent authority to reconsider an interlocutory order. *Los*
19 *Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001); Fed. R. Civ. P. 59; Local
20 Rule 59-1(a). Reconsideration of prior court rulings is generally reserved for instances in which
21 the court changes its position (1) based on the discovery of new evidence; (2) due to a
22 subsequent change in the law; or (3) to correct a clear legal error. *See McDowell v. Calderon*,
23 197 F.3d 1253, 1255-56 (9th Cir. 1999); Local Rule 59-1(a).

1 **Ground 3**

2 Gallegos claimed that his appellate counsel rendered ineffective assistance in violation of
3 his Sixth Amendment rights when counsel failed to argue that law enforcement violated
4 Gallegos' Fifth Amendment right to remain silent by conducting a custodial interrogation of
5 Gallegos without reading him his Miranda rights (ECF No. 42, pp. 28-30). Contrary to
6 Gallegos' assertion in his motion for reconsideration, he does state in his third-amended petition
7 that he did not present this claim to the highest state court (*see* ECF No. 42, pp. 29-30). In that
8 petition, Gallegos urged that he would be able to overcome procedural default of federal ground
9 3 pursuant to *Martinez v. Ryan* 566 U.S. 1 (2012). However, Gallegos later acknowledged in his
10 opposition to the motion to dismiss that the subsequent United States Supreme Court decision in
11 *Davila v. Davis* declined to expand the "narrow" *Martinez* exception to claims of ineffective
12 assistance of appellate counsel. 137 S.Ct. 2058, 2065 (June 26, 2017). *Martinez* cannot provide
13 a basis to overcome default of federal ground 3. Gallegos's motion fails to demonstrate a clear
14 legal error and is not based on the discovery of new evidence or a subsequent change in the law.
15 *See McDowell*, 197 F.3d at 1255-56. The court denies reconsideration of federal ground 3.

16 **Ground 4 (c)**

17 The court concluded that the portion of ground 4(c) that claims that trial counsel was
18 ineffective for failing to investigate the prosecution's witnesses (Hobbs, Taylor, Burgess, and
19 Owens) was unexhausted. Gallegos now re-argues that this ground is exhausted. The state-
20 court record shows that this ground is not exhausted, however. *See*, exh. 5.¹ Gallegos then
21 informs the court that, if it is still of the view that the ground is unexhausted, he wishes the court
22 to dismiss the claim with prejudice (ECF No. 56, p. 8). Accordingly, in the interests of judicial
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¹ ECF No. 12-5.

1 efficiency, the court grants reconsideration of ground 4(c). Ground 4(c) is dismissed with
2 prejudice.

3 **IT IS THEREFORE ORDERED** that petitioner's motion for reconsideration of the
4 court's order on motion to dismiss (ECF No. 56) is **GRANTED** in part and **DENIED** in part as
5 follows:

6 Ground 4(c) is **DISMISSED** with prejudice.

7 **IT IS FURTHER ORDERED** that respondents have **45 days** from the date of this order
8 to file an answer to petitioner's remaining grounds for relief. The answer shall contain all
9 substantive and procedural arguments as to all surviving grounds of the petition and shall comply
10 with Rule 5 of the Rules Governing Proceedings in the United States District Courts under 28
11 U.S.C. §2254.

12 **IT IS FURTHER ORDERED** that petitioner has **30 days** following service of
13 respondents' answer in which to file a reply.

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15 Dated: February ²⁶~~19~~, 2019

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17 Robert C. Jones
18 United States District Judge
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